

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 15711 of 2003

For Approval and Signature:

HON'BLE MR.JUSTICE N.G.NANDI

- =====
1. Whether Reporters of Local Papers may be allowed : NO
to see the judgements?
 2. To be referred to the Reporter or not? : NO
 3. Whether Their Lordships wish to see the fair copy : NO
of the judgement?
 4. Whether this case involves a substantial question : NO
of law as to the interpretation of the Constitution
of India, 1950 of any Order made thereunder?
 5. Whether it is to be circulated to the concerned : NO
Magistrate/Magistrates, Judge/Judges, Tribunal/Tribunals?

FURKAN ABDUL GAFUR KHILJI

Versus

COMMISSIONER OF POLICE AHMEDABAD CITY

Appearance:

1. Special Civil Application No. 15711 of 2003
MR AZIZ AN ALVI for Petitioner No. 1
RULE SERVED for Respondent No. 1-3
MS.PAURAMI SHETH, LD. AGP for Respondent State
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CORAM : HON'BLE MR.JUSTICE N.G.NANDI

Date of decision: 19/02/2004

ORAL JUDGEMENT

1. It is stated by Mr. Aziz N. Alvi, learned
advocate for the petitioner that in the cause title of
the petition at the end of name of the petitioner

"Pathan" be permitted to be added as the detention order refers to Furkan Abdul Gafur Khilji (Pathan). The request for adding word 'Pathan' is permitted at the end of the name of the petitioner - detenu. Amendment be carried out in the cause title of the petitioner.

2. In this petition under Article 226 of the Constitution of India, the petitioner has been challenging the order of detention No: PCB/DTN/PASA/188/03 dated 25-8-2003 (Annexure-A) under section 3 (1) of the Prevention of Anti Social Activities Act, 1985 (PASA Act), passed by respondent no.1 and prays for quashing and setting aside the said detention order.

3. The grounds of detention Annexure-C suggests one case under the provisions of Bombay Prohibition Act having been registered against the petitioner detenu. It is alleged that the petitioner is a head-strong person with criminal tendency, always keeping deadly weapons with him and dealing in sale of country liquor brought from other States which is injurious to the public health; that the petitioner with his associates has been bringing liquor from other States in vehicles and thus the petitioner is a 'bootlegger'. Besides the registered case, two unregistered cases have also been referred to in the grounds of detention relating to the incident of 25-7-2003 and 10-8-2003; that in the grounds of detention invoking privilege under section 9 (2) of the PASA Act the identity of the witnesses have been withheld stating that the contents of their statements, namely allegation against the petitioner about his bootlegging activities and the apprehension expressed by the witnesses have been found to be true and it is necessary to invoke the privilege of withholding identity of the witnesses under section 9 (2) of the PASA Act, in public interest.

4. Ms. Paurami Sheth, learned AGP has placed on record the affidavit in reply filed on behalf of respondent no.1, which is kept on record.

5. Mr. Alvi, learned advocate appearing for the petitioner challenging the impugned detention order has contended that, the requirements of section 9(2) of the Act have not been complied with, in as much as, there is no contemporaneous material to suggest verification of the veracity of the incident as well as the genuineness of the statements and the apprehension expressed by the witness, and therefore, withholding of identity of the witnesses has prejudicially affected the right of the petitioner to make an effective representation.

6. It is submitted by Ms. Paurami Sheth, learned AGP that, it cannot be said that there was no contemporaneous material before the detaining authority and the detaining authority has verified the correctness of the allegations made in the statements after calling the witnesses in person and on the basis of the verification the allegations levelled against the petitioner, the apprehension expressed by the witnesses have been found to be true and genuine and therefore; privilege under section 9 (2) has been exercised in public interest. It is further contended that, there cannot be any other material except the statements of the witnesses because if the detaining authority goes and verifies the contents of the statements in the surrounding area, then, the identity of the witnesses would be disclosed.

7. As far as the availability of other contemporaneous material is concerned, it may be seen that just as the identity of the witness making statement before the police authority and verified by the detaining authority could be withheld, the identity of the witnesses on veracity of the incidents could also be withheld. In my view, the identity including the names & addresses of the witnesses of surrounding area for the verification of the veracity of the incident could equally be withheld invoking the privilege under section 9 (2) of the Act, and therefore it cannot be said that there cannot be any other contemporaneous material in such cases except the statement of the witnesses whose statements have been verified by the detaining authority.

8. In the instant case the statements given by the witnesses have been verified by the detaining authority and what has been stated in the verification by the witnesses is that what has been stated before the police in the statement is correct, and that, there is apprehension to the witnesses from the petitioner and therefore their identity be withheld. Thus in verification the witnesses have reiterated what they earlier stated to the police. Except the statements of the witnesses there is no other material as regards the veracity of what the witnesses stated in their verification. No particular incident has been referred to by the witnesses. The verification has to be as regards the veracity of the incident alleged against the petitioner also.

9. In the case of KAJALBEN G. SINDHI VS. COMMISSIONER OF POLICE, AHMEDABAD & ORS. 2000 (2) GLR pg. 1296, the Division Bench in para-11 and 12 observed

as under :-

" Para-11: As observed by a Division Bench this Court in Bai Amina v. State of Gujarat, 1981 GLR 1186, the mere fact that the relevant particulars and materials were furnished to the detaining authority in confidence by some person is not by itself, a sufficient ground for withholding the disclosure of such particulars and materials, if they have been relied upon against the detenu and their disclosure would assist the detenu in making effective representation against his detention. It was also observed that it was the satisfaction for the detaining authority himself that apprehension expressed by informant is honest, genuine and reasonable in the circumstances of the case. General background, character, antecedents, criminal tendency or propensity etc. of the detenu and such of those matters as are relevant in the context of the informant must be inquired into and carefully examined by the detaining authority with a view to satisfying itself that the alleged apprehension is not imaginary or fanciful or that it is not merely an empty excuse invented by the informant. Relying upon the decision of the Supreme Court in Ganga v. State of Maharashtra, AIR 1980 SC 1744, the Division Bench observed that having regard to the seriousness of the question involved, the detaining authority would be well advised to make a contemporaneous record of the grounds and reasons which weighed with it in withholding the documents, statements, materials and particulars.

In para-12 it is observed :-

" Law laid down in Bai Amina (supra) came to be confirmed by Full Bench of this Court in Chandrakant N. Patel v. State, 1994 (1) GLR 761.

In the instant case, not only there is nothing in the contemporaneous record with regard to formation of such opinion or satisfaction regarding withholding of names and material particulars by the detaining authority, but nothing is stated in the grounds of detention. On the contrary, in the affidavit-in-reply in para 10, the detaining authority has stated that he was subjectively satisfied that if the detenu,

their lives and properties would be in danger. It was further stated that witnesses were not coming forward to register any complaint because of fear and apprehension of insecurity to their lives and properties. Looking to the record, it appears that it was not stated by the witnesses themselves that there would be damage to their properties. It is also not stated by the detaining authority in the order or even in the grounds of detention and that ground was probably stated for the first time in the affidavit-in-reply.

In our opinion, therefore, the case is squarely covered by Bai Amina (supra) as affirmed by the Full Bench. "

10. In the case of KISHOR NAGINBHAI PARMAR V. STATE OF GUJARAT & ORS. 2000 (4) GLR pg. 3236, it has been held that, a mere statement about having verified the veracity, genuineness and correctness of the fear expressed by the witness, can be of no virtue in absence of contemporaneous material, and therefore the detention order for want of proper exercise of powers under section 9(2) of the PASA Act stand vitiated; because the same would have the effect of infringement of constitutional right of the detenu of making an effective representation due to non disclosure of the names of the witness.

In para-14, it has been observed that, the order of detaining authority and the grounds of detention do not indicate the basis of arriving at the subjective satisfaction. A mere statement about having verified the veracity, genuineness and correctness of the fear expressed by the witnesses can be of no avail in absence of contemporaneous material.

11. Thus it would be seen from the above that the mere statement of the witnesses would not be sufficient to sustain the order of detention, since the order of detention does not indicate the basis of arriving at the subjective satisfaction. The order of detention would be liable to be vitiated for want of proper exercise of powers under section 9 (2) of the Act and the resultant infringement of the constitutional right of the detenu of making any effective representation due to non disclosure of names of the witnesses.

12. In the above view of the matter, the impugned detention order is liable to be quashed and set aside and the petitioner detenu is required to be set at liberty.

13. In the result the petition is granted and accordingly allowed. The impugned detention order No: PCB/DTN/PASA/188/2003 dated 25-8-2003 (Annexure-A) passed under section 3 of the Prevention of Anti Social Activities Act, 1985 by Respondent no.1 is quashed and set aside. The petitioner detenu - Furkan Abdul Gafur Khilji (Pathan) is ordered to be set at liberty forthwith, if not required in any other case. Rule is made absolute accordingly. Direct service permitted.

Dt: 19-2-2004

(N.G. Nandi, J)

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